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U.S. Department of Homeland Security
Citizenship and Immigration Services

OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

FILE

Office: PHOENIX, AZ

Date:

NOV 05 2009

IN RE: Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility .

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Acting District Director, Phoenix, Arizona. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be rejected as unnecessary and the application declared moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States (U.S.) pursuant to sections 212(a)(6)(C)(i), 212(a)(2)(A)(I) and 212(a)(1)(A)(iv) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i), 1182(a)(2)(A)(I) and 1182(a)(1)(A)(iv) for procuring and utilizing a fraudulent alien registration card (Form I-551) and social security number in order to obtain employment in the United States, and for being determined to be a drug abuser. The applicant is married to a United States citizen and he is the beneficiary of an approved petition for alien relative. He seeks a waiver of inadmissibility in order to remain in the United States with his U.S. citizen spouse and child.

The acting district director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility pursuant to section 212(a)(1)(A)(iv) of the Act. The application was denied accordingly.

The acting district director did not conduct an analysis of the extreme hardship factors in the present case, based on the finding that the applicant was statutorily ineligible to apply for a waiver of inadmissibility. Despite this fact, however, counsel asserts on appeal that the Service (now Citizenship and Immigration Services, "CIS") erred in finding that the applicant had failed to establish extreme hardship to a qualifying relative. Counsel further disregards the statutory ineligibility conclusions reached in the acting district director's decision, by asserting that emotional, financial and psychological hardship would be imposed on the applicant's wife and child if the present waiver of inadmissibility application is not granted. Counsel does not challenge the ground of inadmissibility findings made against the applicant on appeal. Nor does counsel address the issue that, as a matter of law, the applicant is statutorily ineligible to apply for a waiver of inadmissibility.

Section 212(a)(6)(C)(i) of the Act states:

(6) Illegal entrants and immigration violators.-

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(C) Misrepresentation.-

(i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought

to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The AAO finds that obtaining and presenting a false social security card and alien registration card in order to gain employment from a private employer does not, in and of itself, render the applicant inadmissible under section 212(a)(6)(C)(i) of the Act.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), the Board of Immigration Appeals (Board) held that a respondent who purchased a fraudulent U.S. birth certificate, then used the birth certificate to fraudulently procure a government issued social security number, and later used both documents to procure a government issued U.S. passport, which aided him in traveling in and out of the U.S. and in obtaining employment in the United States:

[C]learly [fell] within the purview of section 212(a)(6)(C)(i) of the Act. By fraud and by willful misrepresentation of a material fact, he sought to procure both "documentation" and "other benefits" under the Act.

The majority opinion provided no further clarification regarding their inadmissibility finding against the applicant. However, the concurring opinion written by Board Chairman, Paul W. Schmidt and Board Member, Gustavo D. Villageliu, made clear the Board's position on the issue of employment by stating that:

[T]he majority's opinion correctly notes that in purchasing the fraudulent birth certificate, using it to procure a fraudulent social security card, and subsequently using these documents to seek to procure a United States passport in order to travel into and out of the United States and seek employment, the respondent sought to procure both "documentation" and "other benefits" under the Act However, a small clarification is needed. The other benefits under the Act the respondent sought to procure are the right to travel with a United States passport pursuant to section 215(b) of the Act, 8 U.S.C. § 1185(b) (1994). The majority's language may be misinterpreted as suggesting that using the fraudulent passport to obtain employment is obtaining a benefit under the Act.

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Although the use or possession of such document is punishable under section 274C of the Act . . . working in the United States is not "a benefit provided under

this Act," and we have specifically held that a violation of section 274C and fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act are not equivalent.

The AAO finds that the acting district director also erred in concluding that the applicant's procurement and use of a fraudulent alien registration and social security card for employment purposes constituted a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A)(i)(I) of the Act states:

(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general. - Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime) . . . is inadmissible.

In *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) the Board held:

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea [fraudulent conduct] may not be determined from the statute, moral turpitude does not inhere.

In *Matter of Katsanis*, 14 I&N Dec. 266, 268 (BIA 1973), the Board stated that "[m]oral turpitude attaches to crimes where fraud is an ingredient." (Citations omitted).

The acting district director's decision made no reference to a statute, criminal or otherwise, under which the applicant's actions constitute a crime involving moral turpitude, and there is no other information or evidence in the record to substantiate the charge that the applicant's procurement and use of a fraudulent alien registration and social security card to obtain employment in the U.S. constitutes a crime involving moral turpitude.

In addition to determining that the acting district director erred in finding the applicant inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(2)(A)(i)(I) of the Act, the AAO finds that the acting district director also erred in concluding that the applicant is inadmissible pursuant to drug abuser and addict provisions under section 212(a)(1)(A)(iv) of the Act.

Section 212(a)(1)(A)(iv) of the Act provides:

(1) Health-related grounds.-

(A) In general.-Any alien-

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

In order to support a finding of inadmissibility under section 212(a)(1)(A)(iv) of the Act, the acting district director must first establish that a civil surgeon or CIS panel physician medically determined the applicant to be a drug abuser or addict.

In the present case, the acting district director's decision indicates that his finding was based on sworn testimony given to a CIS officer in June, 2001, in which the applicant stated that he:

[L]ast used cocaine on or about January 2001, and that from 1997 until approximately January 2001, [he] used cocaine about six times per year. [The applicant] stated that [he] used marijuana from approximately 1991 until 1997, and that he used marijuana about one time per week.

Acting District Director's Decision at 2. Based on the above information, the acting district director's decision concluded:

The regulations prescribed by the Secretary of Health and Human Services requires a determination that an applicant for admission or adjustment of status be found to be a drug abuser if he or she has used marijuana or any illegal narcotic drug within the three years preceding the application for admission or adjustment of status. In consideration of your admission to the use of cocaine and marijuana within the past three years, it is found that you are inadmissible to the United States pursuant to Section 212(a)(1)(A)(iv) of the Immigration and Nationality Act.

Id. The AAO notes that the applicant's Medical Examination of Aliens Seeking Adjustment of Status Form (Form I-693), dated May

29, 2001, contains no medical conclusion or information to indicate that the applicant was deemed by the examining physician to be a drug abuser or addict, and the record contains no other evidence to indicate that the applicant was determined to be a drug abuser or addict by a civil surgeon or panel physician.

The "Technical Instructions for Medical Examination of Aliens in the United States" ("Instructions") state that:

[T]he Centers for Disease Control (CDC), United States Public Health Service (PHS), is responsible for ensuring that aliens entering the United States do not pose a threat to the public health of this country. The medical examination is one means of evaluating the health of aliens applying for admission or adjustment of status as permanent residents in the United States.

See *Instructions* at preface.¹ The Instructions state further that:

Aliens applying for adjustment of status to permanent resident must have a physical and mental examination as part of the application process

. The purpose of the medical examination is to identify the presence or absence of certain disorders that could result in exclusion from the United States under the provisions of the Immigration and Nationality Act.

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The civil surgeon is responsible for reporting the results of the medical examination and all required tests on the prescribed forms. The civil surgeon is not responsible for determining whether an alien is actually eligible for adjustment of status; that determination is made by the [CIS] officer after reviewing all records, including the report of the medical examination.

Id. at I-1. The Instructions discuss drug abuse or addiction as one of the health-related grounds of exclusion that the civil surgeon must examine and identify during the medical examination. See *Instructions* at I-2 to I-3. The Instructions indicate further that:

Findings of drug abuse or addiction should be indicated in the "Remarks" section of the medical report form. The civil surgeon should indicate the specific drug that is/was being used and the last time it was used if

¹ The Instructions can be located on the internet at: www.cdc.gov/ncidod/dq/technica.htm and www.cdc.gov/ncidod/dq/civil.htm

the patient has discontinued its use.

Id. at II-3. See also *Id.* at III-12. Moreover, the AAO notes that the CIS Adjudicator's Field Manual states that:

[T]he Technical Instructions published by the CDC refer to the nonmedical use of a psychoactive substance, and make an exception for experimentation. The CDC has instructed civil surgeons and panel physicians to use their clinical judgement and/or seek a consultation when facing a situation where the applicant's medical history indicates past nonmedical use of a psychoactive substance or when there is a clinical question as to whether the use was experimental or part of a pattern or abuse. If you [the adjudicator] have valid reasons to question the completeness or accuracy of the medical exam report, you [the adjudicator] may direct the applicant to return to the civil surgeon or panel physician for a reexamination or ask the CDC to review the medical report.

See Section 23.3(4) of the CIS Adjudicator's Field Manual.

Based on the information contained in the CDC/PHS Instructions and the CIS Adjudicator's Field Manual discussed above, the AAO finds that the acting district director's determination that the applicant is inadmissible as a drug abuser is unsupported by the medical evaluation or evidence contained in the file and that the finding is therefore erroneous.

In reviewing all of the grounds of inadmissibility as charged in the director's decision, the AAO finds that none area supportable by the information contained in the record. As such, the applicant is not inadmissible to the U.S., and therefore, the waiver application is moot.

ORDER: The appeal is rejected as unnecessary and the application declared moot.